

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LORIE M. GUYES, individually and as
representative of a Class of Participants
and Beneficiaries of the ThedaCare
Retirement and 403(b) Savings Plan,

Plaintiff,

v.

Case No. 20-C-1560

NESTLE USA INC., et al.,

Defendants.

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

On November 21, 2022, Magistrate Judge Stephen C. Dries recommended that I grant the defendants' motion to dismiss the plaintiff's complaint and dismiss with prejudice the plaintiff's claims of breach of the duty of loyalty regarding recordkeeping and administration fees, breach of the duties of prudence and loyalty regarding managed account service fees, failure to adequately monitor other fiduciaries regarding managed account service fees, and engaging in prohibited transactions. The magistrate judge further recommended that I partially grant the plaintiff's Rule 7(h) motion for leave to file an amended complaint and permit the plaintiff to proceed on her recordkeeping claims only (Counts I and III). The defendants filed timely objections to the recommendation pursuant to 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b)(2). Therefore, this court must conduct a de novo review. Having reviewed the recommendation and objections, as well as the record as a whole, I overrule the objections and adopt the Report and Recommendation.

The defendants object to the Report and Recommendation insofar as it grants the plaintiff leave to amend her complaint with respect to her recordkeeping claims. They argue that the plaintiff's proposed amended complaint is futile because it fails to provide the kind of additional context regarding the Plan's recordkeeping services that the Seventh Circuit held was necessary in *Albert v. Oshkosh Corp.*, 27 F.4th 570 (7th Cir. 2022). After the opportunity to amend the pleadings as a matter of course has passed, a party may amend a complaint only with the consent of the opposing party or leave of the court. Fed. R. Civ. P. 15(a). Generally, motions to amend pleadings are treated favorably under Rule 15's liberal amendment policy. *Id.* Leave to amend should be "freely given," absent considerations such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Seventh Circuit has advised that "cases of clear futility at the outset of a case are rare." *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. and Nw. Ind.*, 786 F.3d 510, 518 (7th Cir. 2015). Given Rule 15's liberal standard, the court finds that the defendants' arguments regarding the inadequacy of the plaintiff's allegations are better suited for consideration in the context of a motion to dismiss. In other words, while the defendants are free to raise these arguments on a motion to dismiss, or at a later point in the litigation, the court declines to resolve these issues now without the benefit of thorough briefing directed toward the issue.

IT IS THEREFORE ORDERED that Magistrate Judge Dries' Report and Recommendation (Dkt. No. 35) is **ADOPTED**.

IT IS FURTHER ORDERED that, for the reasons stated in the Report and Recommendation, the defendants' motion to dismiss (Dkt. No. 13) is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiff's motion to file an amended complaint (Dkt. No. 32) is **GRANTED-IN-PART** and **DENIED-IN-PART**. The Clerk is directed to detach and e-file the amended complaint (Dkt. No. 32-1). The plaintiff may only proceed on her recordkeeping claims (Counts I and III). The following claims are dismissed with prejudice: breach of the duty of loyalty regarding recordkeeping and administration fees; breach of the duties of prudence and loyalty regarding managed account service fees; failure to adequately monitor other fiduciaries regarding managed account service fees; and engaging in prohibited transactions. The defendants must file a responsive pleading to the amended complaint within 30 days of the date of this order.

Dated at Green Bay, Wisconsin this 3rd day of January, 2023.

s/ William C. Griesbach

William C. Griesbach
United States District Judge